

1 John A. Furlong, Bar No. 018356
General Counsel
2 STATE BAR OF ARIZONA
4201 North 24th Street, Suite 200
3 Phoenix, Arizona 85016-6288
Telephone: (602) 252-4804
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6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8 PETITION TO AMEND RULE 4.1,
9 ARIZONA RULES OF CIVIL
PROCEDURE

Supreme Court No. R-10-0002

**Comment of the State Bar of Arizona
Regarding Petition to Amend Rule 4.1,
Arizona Rules of Civil Procedure**

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14 The State Bar of Arizona respectfully opposes the petition to amend Arizona
15 Rule of Civil Procedure 4.1 to allow service by regular mail of photo radar traffic
16 citations. Existing Rule 4.1 generally requires personal service, with certain
17 exceptions that include: (a) service by mail is effective if the recipient signs and
18 returns an acknowledgement of waiver of service, *see* Rule 4.1(c);¹ (b) service by
19 publication is allowed in limited circumstances, *see* Rule 4.1(n); and (c) where
20 other methods of service “prove[] impracticable,” the complainant may seek a court
21 order authorizing “alternate or substituted service,” *see* Rule 4.1(m). The foregoing
22 exceptions are currently available, as applicable, for photo radar traffic citations.²

23 ¹ Consistent with Rule 4.1, as noted in the Petition, Rule 45 of the Arizona Rules of
24 Civil Procedure in Civil Traffic & Civil Boating Cases (“Civil Traffic Rule(s)”) currently
25 allows service of a traffic ticket and complaint by first-class mail with an option to
respond by mail. If the recipient does not respond by mail, however, personal service is
required. Civil Traffic Rule 45(a), (e).

26 ² Both the State Bar Civil Practice and Procedure Committee and the Criminal Law
Practice and Procedure Committee voted unanimously to oppose the Petition. This
Comment incorporates comments received from both Committees.

1 The Petition seeks to add a further exception, applicable only to photo radar
2 citations: “Service of a violation captured by photo enforcement system may be
3 made by mailing a copy of the traffic complaint to the address of the registered
4 vehicle owner on file with Department of Transportation, Motor Vehicle Division.”
5 [Petition, Exhibit A (Proposed Rule 4.1(p))]. No acknowledgement of receipt is
6 required, nor does the proposed amendment indicate when service is considered
7 effective.

8 For the following reasons, discussed more fully below, the State Bar does not
9 believe that the proposed amendment should be adopted: (1) the proposed
10 amendment seeks a substantive change in service requirements for a special class of
11 cases, which is a matter more appropriate for the Arizona legislature; and (2) the
12 reasons given in support of the proposed amendment are insufficient to support a
13 special court rule exception for photo radar citations.

14 **THE PROPOSED RULE ALLOWING SERVICE BY MAIL FOR PHOTO**
15 **RADAR CITATIONS SHOULD NOT BE ADOPTED.**

16 **A. The Proposed Rule Seeks a Substantive Exception to Normal**
17 **Service Requirements That is More Appropriate for the**
18 **Legislature to Consider.**

19 Rule 4.1’s service requirements apply in all types of civil actions, and contain
20 no “exceptions” for particular types of cases. The Petition seeks to add a new
21 exception directed at one particular type of case—photo radar traffic citations. In
22 support, the Petition argues (at 2, 4-6) that this type of case warrants a special
23 exception, primarily because the amount at stake is too small to justify the cost of
24 personal service, and because the current system allows abuse by individuals
25 attempting to evade service.

26 The Petition’s arguments only underscore why any special service
exceptions, based on the type of case, should be left to the legislature. Many types

1 of cases raise similar issues of cost and service evasion—foreclosure actions and
2 small collections matters are two examples. There is no reasoned basis on which
3 the Court should favor one such type of case over another in relaxing the normal
4 rules governing service of process.

5 On the other hand, where a public policy reason exists to modify service
6 requirements for particular types of cases, the Arizona legislature has done so by
7 statute. For example, Ariz. Rev. Stat. § 22-513(A), governing service in small
8 claims cases, allows service by “registered or certified mail,” and provides that such
9 service is completed “on the date of delivery of the registered or certified mail to
10 the defendant as indicated on the return receipt.” Similarly, the legislature has
11 enacted statutes allowing service by mail for certain types of civil traffic violations,
12 *see, e.g.*, Ariz. Rev. Stat. § 28-1591(C).

13 As these examples illustrate, the Arizona legislature is the appropriate body
14 to decide whether photo radar enforcement actions warrant special service rules that
15 are even less onerous than those adopted for small claims matters. That conclusion
16 is reinforced by the public controversy surrounding photo radar traffic citations in
17 the State of Arizona. Recent newspaper reports indicate that the Petition is
18 sponsored by the company that owns and operates the photo radar cameras, raising
19 questions about the public purpose behind the proposed rule change. These are
20 matters for the legislature, not the courts.

21 **B. The Reasons Set Forth in the Petition Do Not Support the**
22 **Proposed Special Service Exception.**

23 Taken on their own merits, the Petition’s various arguments do not support
24 the proposed exception:
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1 1. **Other state laws.**

2 The Petition argues (at 3, 8) that the proposed rule change will “bring
3 Arizona procedure in line with the practice of other states that have adopted photo
4 enforcement,” arguing that “numerous other jurisdictions ... allow mailed service
5 of process in photo enforcement cases.” [See Petition Exhibit C]. The Petition’s
6 Exhibit C does not contain supporting citations, but it appears that of the cited
7 jurisdictions:

- 8 • *None* of them allow for service by regular mail by *court rule* as
9 proposed in the Petition. [See Appendix A hereto (Summary of Photo
10 Radar Service Requirements for States Identified in Petition Exhibit
11 C)]
- 12 • Twenty of them allow service by mail by *statute* or, in some cases, by
13 local ordinance, reflecting a policy decision of the state legislature or
14 other governing body;³ and
- 15 • In the rest of the cited jurisdictions, a signed acknowledgement or
16 return receipt is required for effective service by mail, consistent with
17 Arizona’s current Rules 4.1(c) (signed waiver of service) and 4.2(c)
18 (service by mail with signed and returned receipt).

19 Thus, far from supporting the Petition, the practices of other states weigh in
20 favor of leaving Arizona’s Rule 4.1 intact and deferring to the legislature to decide
21 the policy question presented by the Petition.

22 2. **The cost and difficulty of service.**

23 The Petition also argues (at 5) that service by mail should be allowed as a
24 cost-saving measure, asserting that the change will save “millions of dollars in
25 unnecessary personal service costs” at a time when “government budgets have been

26 ³ Some of these jurisdictions require the use of certified mail and contain other
protections not included in the proposed amendment.

1 spread extremely thin.” No data is presented to support this claim of burden. More
2 fundamentally, existing rules allow the government to recover the cost of personal
3 service if a signed acknowledgement of receipt is not returned. *See Tonner v.*
4 *Paradise Valley Magistrate’s Court*, 171 Ariz. 449, 450, 831 P.2d 448, 451 (App.
5 1992) (costs of service of civil traffic citation can be “shifted to the defendant”
6 where signed acknowledgement not returned, but personal service is required or
7 judgment is void); Civil Traffic Rule 45(e) (if the defendant fails to respond by mail
8 to traffic complaint, court “shall impose” costs of personal service). In any event,
9 the arguments of expense and burden apply equally to a myriad of other types of
10 cases, reinforcing that any special carve-out for photo radar citations should be left
11 to the legislature.

12 3. **Due process concerns.**

13 The Petition argues (at 7) that due process concerns are satisfied,
14 emphasizing that the monetary penalty is small and that “the courts will retain
15 discretion to set aside a default judgment in appropriate instances.” In support, the
16 Petition cites *Oregon v. King*, 111 P.3d 1146 (Or. App. 2005), where service of
17 photo radar citations by mail was upheld against a due process challenge.

18 Regardless of whether the proposed rule ultimately would survive a due
19 process challenge under federal and Arizona law, the Court should consider the
20 following concerns in evaluating the Petition:

21 (1) Service by regular mail may not be reasonably targeted to reach the
22 actual driver of a vehicle involved in an alleged traffic violation, including:
23 (i) where the registered owner is not the actual driver; (ii) where the vehicle is
24 registered to an entity rather than an individual; (iii) where the address on file with
25 the Motor Vehicle Division is incorrect or out of date; or (iv) where regular mail is
26 simply misdirected, *see Reddell v. Industrial Comm’n*, 111 Ariz. 313, 315, 528 P.2d

1 1254, 1256 (1974) (“We regret that we must take judicial notice of the declining
2 efficiency and reliability of the United States Post Office Department. A rule
3 which relies upon the past efficiency and reliability of the United States Post Office
4 Department, while most certainly a reasonable rule in the past, is today no longer
5 justified. . . .”).

6 (2) The Petition (at 6-7) unduly minimizes the burden associated with
7 entry of a default judgment on a photo radar citation. Although the monetary
8 penalty may be relatively small, the consequences of a default judgment can be
9 significant, as this can affect an individual’s credit rating, create a lien on real
10 property, lead to increased insurance rates, and cause other negative consequences
11 beyond the penalty amount. Additionally, Ariz. Rev. Stat. § 28-1557(B)(2)(c)
12 provides that upon entry of a default judgment on a civil traffic complaint, the
13 driver’s license “will be suspended until the civil penalty is paid.” Thus, a person
14 who contests a default judgment based on defective service would face the
15 Hobson’s choice of having to pay the fine or risk a suspended license while the
16 judgment is contested.⁴ Moreover, absent proof of effective service, a motorist may
17 not only be unaware of a default, but may also be unaware that his or her failure to
18 pay the fine imposed upon default has led to a suspended driver’s license.

19 Additionally, the Petition ignores that photo radar citations for criminal
20 speeding violations (anything twenty mph or greater over the speed limit) also
21 would be governed by the proposed rule. *See* Ariz. R. Crim. P. 3.4 (criminal
22 summons may be served in same manner as a civil action). Arizona has long

23 ⁴ As the Petition notes (at 6), Ariz. Rev. Stat. § 41-1722(D) provides that the
24 Department of Transportation shall not consider photo radar citations “for the purpose of
25 determining whether the person’s driver license should be suspended or revoked.” While
26 this statutory provision prevents the accrual of points towards suspension or revocation for
photo radar citations, it does not appear to protect a driver from license suspension under
§ 28-1557(B)(2)(c) after a default judgment is entered. It also does not prevent insurance
companies from raising rates where a motorist is found responsible for a photo radar
traffic citation.

1 required personal service of process in criminal matters, and a proposed change that
2 would allow criminal liability to be established based on service by regular mail,
3 with no proof of receipt, raises serious due process concerns.

4 Finally, Ariz. R. Civ. P. Rule 60(c)'s procedures for setting aside a judgment
5 can present a considerable burden for individuals who are not represented by
6 counsel. Given the "false positives" likely to result from allowing service by
7 regular mail without requiring any return acknowledgment of service, shifting this
8 burden to the individual raises due process concerns that are not adequately
9 addressed by the Petition.⁵

10 Notably, the procedure upheld by the Oregon court in *King* differs materially
11 from the proposed Arizona rule.⁶ Oregon's service by mail provisions are part of a
12 statutory scheme, rather than a court rule exception. In upholding service by mail
13 in that context, the Oregon court emphasized that the legislature had made specific
14 findings regarding the strong public interest at stake. In contrast here, although the
15 legislature has seen fit to allow service by mail in other classes of cases (*see*
16 discussion above), no such statutory exception exists in Arizona for photo radar
17 citations. The Oregon statute also contains other protections not present here,
18 which the Oregon court emphasized in holding that service by mail satisfied due
19 process requirements. *King*, 111 P.3d at 1148 (in rejecting due process challenge,

21 ⁵ In contrast, in cases where Rule 4.1 allows service by publication, the Rules
22 contain less stringent requirements for challenging any resulting judgment. *See* Ariz. R.
23 Civ. P. 59(j) (judgment entered after service by publication may be set aside within one
24 year upon an affidavit showing "good cause").

25 ⁶ Although photo radar enforcement laws have generally been upheld against
26 constitutional attack, the Oregon court's decision in *King* is the only case cited in the
Petition where a court has specifically addressed the constitutionality of serving photo
radar citations by regular mail without requiring a signed receipt or acknowledgement of
service. *Agomo v. Fenty*, 916 A.2d 181 (D.C. App. 2005), cited in the Petition (at 7), held
that District of Columbia Code provisions establishing a presumption of liability did not
violate due process, and that the compensation arrangement between the private photo
radar company and the District did not establish unconstitutional bias.

1 court emphasizes "safeguards" of the Oregon statutory scheme, including that the
2 citation must be mailed within six business days of the alleged violation and that
3 the equipment must be operated "by a uniformed police operator out of a marked
4 police vehicle").

5 **CONCLUSION**

6 For the foregoing reasons, the State Bar respectfully opposes the Petition to
7 amend Civil Rule 4.1 to allow service of photo radar traffic citations by regular
8 mail.

9 RESPECTFULLY SUBMITTED THIS 11th day of May, 2010.

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14 John A. Furlong
General Counsel

15 Electronic copy filed with the
16 Clerk of the Supreme Court of
Arizona on this 11th day of May, 2010.

17 A copy was mailed to:
18 John D. Wintersteen
19 4702 E. Lincoln Drive
20 Paradise Valley, AZ 85253

21 this 11th day of May, 2010.

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23 By: Kathleen Lundgren
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Appendix A

Appendix A

Summary of Service Requirements for States Identified in Petition Exhibit C

Jurisdiction	Method of service allowed	By Rule or Statute?
<p>Alabama*, Delaware, District of Columbia, Georgia, Illinois, Iowa*, Maryland, Missouri*, New Jersey, New York, North Carolina, Ohio, Oregon, Louisiana*, Pennsylvania, Rhode Island, South Dakota*, Tennessee, Texas, Washington</p> <p>* The Petition acknowledges that service in these jurisdictions is governed by local ordinance.</p>	<p>First class mail or by certified mail, return receipt requested</p>	<p>By Statute, <i>see</i>:</p> <p>Delaware: Del. Code Ann. tit. 21, § 4101(d)(4).</p> <p>District of Columbia: D.C. Code § 50-2209.02(b).</p> <p>Georgia: Ga. Code Ann. § 40-6-20 (certified mail, return receipt requested).</p> <p>Illinois: 625 Ill. Comp. Stat. Ann. 7/30(b) (certified mail, return receipt requested).</p> <p>Maryland: Md. Code Ann. Transp. § 21-809(d), (g), (h); Md. Code Ann. Transp. §21-202.1(e).</p> <p>New York: N.Y. Vehicle & Traffic Law § 1111-a(g)(1).</p> <p>North Carolina: N.C. Gen. Stat. §1 60(A)-300.1(c)(3).</p> <p>Oregon: Or. Rev. Stat. Ann. § 810.439(1)(a)(E) and (c)(2), (4).</p> <p>Pennsylvania: Penn. Cons. Stat. Ann. § 3116(j), (k).</p> <p>Rhode Island: R.I. Gen.</p>

Jurisdiction	Method of service allowed	By Rule or Statute?
		<p>Laws § 31-41.2-3(b).</p> <p>Tennessee: Tenn. Code Ann. § 55-8-198(b).</p> <p>Texas: Tex. Code Ann. § 707.011(a), (d).</p> <p>Washington: Wash. Rev. Code Ann. § 46.63.170(1)(e).</p> <p>By local ordinance (no special statewide method of service prescribed), <i>see, e.g.</i>:</p> <p>New Jersey: E.g., City of Newark Ord. 23.11-4(e) (summons must comply with rules of court); Municipal Ct. Rule 7.2 (service of summons by certified mail with return receipt requested).</p> <p>Ohio: E.g., Cleveland Codified Ordinance § 413.031(h), (k).</p>
California, Florida, New Mexico, Utah ⁷	Certified or registered mail, signed return receipt	<p>By Court Rule, <i>see</i>:</p> <p>California: Cal. Vehicle Code Sections 21455.5 & -.6</p>

⁷ It appears that California, New Mexico, Florida and Utah have not adopted any prescribed statewide method for serving photo radar citations by regular mail. However, municipalities in these jurisdictions may have adopted rules allowing for alternative methods of service. General rules of court in these jurisdictions, as in Arizona, require a return receipt for effective service by mail.

Jurisdiction	Method of service allowed	By Rule or Statute?
	required	<p>(governing use of photo radar, with no service provisions); Cal. Civ. Proc. Code § 415.30 (general service by mail; § 415.30(c) provides that service is deemed complete on the date a written acknowledgement of receipt of summons is executed; § 415.30(d) provides that if no acknowledgement form is completed, then the defendant may be liable for the costs of alternative means of service).</p> <p>Florida: Fla. R. Civ. Proc. Rule 1.070(i) (allowing service by mail with signed waiver of service).</p> <p>New Mexico: N.M. Stat. Ann. § 66-7-103.1 (no service requirements specified); New Mex. Rules of Civ. Proc. for Metropolitan Courts Rule 3-202(E) (general service by mail); New Mex. Rules of Civ. Proc. for D. Cts. Rule 1-004(E)(3) (general service by mail).</p> <p>Utah: Utah Code Ann. § 41-6a-608 (no service requirements specified);</p>

Jurisdiction	Method of service allowed	By Rule or Statute?
		Utah Rules of Civ. Proc. Rule 4(d)(2) (general service by mail complete with signed receipt).